89-1237

NO.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

GOGOLIN + STELTER,

Petitioner,

v.

FIRST CITY BANK, BELLAIRE, N.A.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Joseph C. Blanks
READ, MORGAN & QUINN
909 Laurel Street
Beaumont, Texas 77704
(409) 838-9941

Attorney of record for Petitioner

Charles Dewey Cole, Jr.
MEYER, SUOZZI, ENGLISH & KLEIN, P.C.
1505 Kellum Place
Mineola, New York. 11501
(516) 741-6565

Attorney for Petitioner

January 16, 1990

QUESTION PRESENTED

May a civil action against a corporation residing soley in one judicial district and against another corporation, deemed to be a resident of each district in the same state, be commenced in any district in the state when Congress has provided in section 1392(a) of the Judicial Code that "[a]ny civil action ... against defendants residing in different districts in the same State, may be brought in any of such districts?"

RULE 28.1 LISTING

Counsel of record for petitioner certifies that the parties to this proceeding are:

GOGOLIN + STELTER

FIRST CITY BANK, BELLAIRE, N.A.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases PAGE

Statutes & Treatises

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The petitioner, Gogolin + Stelter, respectfully requests that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on October 17, 1989.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 886 F.2d 100 (5th Cir. 1989) and is reproduced in the appendix at *a*. The judgment of the United States District Court for the Eastern District of Texas is unreported and is reproduced in the appendix at *m*. The judgment of the United States Court of Appeals for the Fifth Circuit is reproduced in the appendix at *p*.

JURISDICTION

The petitioner, a partnership both of whose members are aliens, brought this civil action in the United States District Court for the Eastern District of Texas against a national bank, a Texas corporation, and a Texan. The district court, which had jurisdiction pursuant to the alienage clause, 28 U.S.C. § 1332(a)(2), entered a judgment in favor of the petitioner.

On the respondent's appeal, the United States Court of Appeals for the Fifth Circuit on October 17, 1989 entered a judgment vacating the judgment of the district court and directing that court either to dismiss the action for improper venue or to transfer the action to the Southern District of Texas. No petition for rehearing was filed.

The jurisdiction of this Court to review the judgment of the Fifth Circuit is invoked under section 1254(1) of the Judicial Code, 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

28 U.S.C. § 1392. Defendants or property in different districts in same State.

(a) Any civil action, not of a local nature, against defendants residing in different districts in the same State, may be brought in any of such districts.

STATEMENT OF THE CASE

This case arises from the sale of motorcars from Germany by Gogolin + Stelter (Stelter), a German partnership,[1] to Karn's Auto Imports, Inc. (Karn's), a Texas corporation. Stelter shipped the motorcars to the Port of Houston and delivered documents of title to the banker for Karn's, First City Bank, Bellaire, N.A. (First City), a national bank apparently doing business only in the Southern District of Texas. Stelter authorized First City to let Karn's inspect the documents but instructed the bank to release the documents only on full payment of the invoice amounts. Karn's did not pay the bank for the motorcars, but it got the documents anyhow, with which it obtained the motorcars from the customs warehouse.

Stelter sued First City, Karn's, and the principal of Karn's in the United States District Court for the Eastern District of Texas invoking the court's alienage jurisdiction. *See* 28 U.S.C. § 1332(a)(2). After the jury found that First City "negligently mishandled the documentation so that Karn's walked off with the autos and the certificates of title and never paid for them," 886 F.2d at 101, the district court entered judgment for Stelter for the invoice amounts and other damages.

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[1] The transaction with Karn's Auto Imports, inc. was actually done through Stelter Handelgesellschaft G.m.b.H., a firm related to petitioner and having a common principal, Thomas Stelter. It bought the motorcars from Gogolin + Stelter for sale to Karn's but was unable to pay for them following the loss. It assigned its claim in this action to Gogolin + Stelter.

First City appealed. A panel of the Fifth Circuit, acknowledging "that sufficient evidence existed to justify a jury finding that First City negligently handled the transaction involving the title documents to the two automobiles," 886 F.2d at 105, nevertheless vacated the judgment for improper venue. The panel construed section 1392(a) of the Judicial Code, which provides that "[a]ny civil action ... against defendants residing in different districts in the same State, may be brought in any of such districts," 28 U.S.C. § 1392(a), to apply only when, contrary to the wording of the statute, the defendants do not reside in the same judicial district. Since Karn's was a resident of the sole district in which First City resided, the panel held that Stelter was required to commence its action in that district, the Southern District of Texas. Because Stelter had not done so, the Fifth Circuit vacated the judgment and directed the district court to dismiss or transfer the action.

REASONS FOR GRANTING THE WRIT

This Court should grant the petition to resolve an important issue of statutory construction that has divided the inferior federal courts for 40 years and has led to needless uncertainty in selecting a venue for a federal civil action. Moreover, due to the interlocutory nature of venue decisions, the "nice question" raised by the petition, *see* C. Wright, FEDERAL COURTS § 42 at 245 (4th ed. 1983), is unlikely to be presented frequently, or as clearly, to this Court for review.

Congress specified the venue for diversity actions in section 1391(a) of the Judicial Code, which states, "[a] civil action ...: may, *except as otherwise provided by law*, be brought only in the judicial district where all plaintiffs or all defendants reside, or in which the claim arose." 28 U.S.C. § 1391(a) (emphasis added). When this action was commenced, Congress had defined the residence of corporate defendants in civil actions in section 1391(c), which provided "[a] corporation may be sued in any judicial district in which it is incorporated to do business or is doing business, and such judicial district shall be regarded as the residence of such corporation for venue purposes." 28 U.S.C. § 1391(c). Finally, Congress "otherwise provided" "a limited statutory escape from the requirement that venue based on residence must be in the district in which all the parties who are being looked to reside," 15 C. Wright, A. Miller & E. Cooper, FEDERAL PRACTICE AND PROCEDURE § 3807 (2d ed. 1986), when it enacted section 1392(a) of the Judicial Code. That statute provides that in the case of defendants residing in different districts in the same state, "[a]ny civil action ... may be brought in any of such districts." 28 U.S.C. § 1392(a).

Though these provisions are susceptible to a straightforward application in many cases, a recurring problem in multi-district states is presented when one defendant is a state-chartered corporation, residing in each district, and another defendant, usually a natural person, resides in one district only. In such cases, there is a division of authority

whether the plaintiff may invoke section 1392(a) and lay venue in a district in which only the corporation resides or whether the plaintiff is limited to commencing his action only in the district in which both defendants reside. In this case, the Fifth Circuit adopted the latter view. The leading treatise on federal practice recognizes that the "cases are divided on this nice question." C. Wright, FEDERAL COURTS § 42, at 245 (4th ed. 1983).

Some inferior federal courts have followed the clear and unambiguous language of section 1392(a) and, applying the text of the statute, have permitted suit in any judicial district in which one defendant resides even when it resides with all other defendants in a different district in the state. *See, e.g., Board of County Commissioners v. Wilshire Oil Co.*, 523 F.2d 125 (10th Cir. 1975) (applying § 1392(a) to liberalize rather than restrict venue in antitrust case); *Vance Trucking Co. v. Canal Insur. Co.*, 338 F.2d 943 (4th Cir. 1964) (applying § 1392(a) when defendants had another, common district of residence); *Jackson v. Phelps County Regional Medical Center*, 702 F. Supp. 235 (W.D. Mo. 1988) (all defendants resided in district where claim arose, venue proper in district where corporate defendant had done no business); *PI, Inc. v. Valcour Imprinted Papers, Inc.* 465 F. Supp. 1218 (S.D.N.Y. 1979) ("Congress used 'absolutely unambiguous language' ... which contains not the slightest hint that venue under [§ 1392(a)] is available only when there is no one district in which all defendants reside"); *Kirkland v. New York State Dept. of Correctional Services,*

358 F. Supp. 1349 (S.D.N.Y. 1973) (rejecting view that § 1392(a) applies only if there is no district in which all defendants are amenable to suit); *Hawkins v. National Basketball Assoc.*, 288 F. Supp. 614 (W.D. Pa. 1968) (common residence of defendants no bar to venue in other district); *De George v. Mandata Poultry Co.*, 196 F. Supp. 192 (E.D. Pa. 1961) (action against residents within the same state "may be brought in any district in which they reside"); *Minter v. Fowler & Williams, Inc.*, 194 F. Supp. 660 (E.D. Pa. 1961) (venue proper for individual and corporate defendant in any district "so long as *one* of the defendants resides therein") (emphasis in original). *See also Williams v. Hoyt*, 372 F. Supp. 1314 (E.D. Tex. 1974) (applying § 1393(b) to the same effect with different divisions of the same district); *McCroskey v. Texas Marine Survey Co., Inc.*, 87 F.R.D. 691, 693 (S.D. Tex. 1980) (opposite result). *Cf. Checki v. Webb*, 785 F.2d 534 (5th Cir. 1986) (approving venue in one of two districts in which claim arose, although defendants resided in other district in which claim arose); *Cheeseman v. Carey*, 485 F. Supp. 203, 210 (S.D.N.Y.) ("Nothing in the history or language of Section 1392(a) suggests an ungenerous application"), *remanded on other grounds*, 623 F.2d 1387 (2d Cir. 1980); *Davis v. Hill Engineeering, Inc.*, 549 F.2d 314 (5th Cir. 1977) (venue proper in district in which neither defendant did business, although both had agent in other district); *Johnstone v. York County Gas Co.*, 193 F. Supp. 709 (E.D. Pa. 1961) (corporations doing business in common

district sued in another district where only one was doing business). *See generally* C. Wright, FEDERAL COURTS § 42 n.43 (4th ed. 1983).

Other federal courts have attempted to improve upon the plain language of section 1392(a) and have held it to apply only when no common district of residence exists. *See, e.g., Canady v. Koch*, 598 F. Supp. 1139 (E.D.N.Y. 1984) (dicta that § 1392(a) is inapplicable since action could be brought in another district); *Andrew H. v. Ambach*, 579 F. Supp. 85 (S.D.N.Y. 1984) (dicta that "where all defendants reside in the same district, § 1392(a) should not apply); *Mazella v. Stineman*, 472 F. Supp. 432 (E.D. Pa. 1979) (statute applies only if required to avoid multiple suits); *Johnson v. B.G. Coon Construction Co.*, 195 F. Supp. 197 (E.D. Pa. 1960) (although one defendant resided in multiple districts, venue proper only where all defendants had common residence); *Hawks v. Maryland & Penn. Railroad Co.*, 90 F. Supp. 284 (E.D. Pa. 1950) (§ 1392(a) to be invoked only when general venue statute would require two or more suits). *See generally* C. Wright, FEDERAL COURTS § 42 n.43 (4th ed. 1983).

This Court recently observed the limits on a federal court when construing Rules of Civil Procedure and statutes, noting that the "task is to apply the text, not to improve upon it." *Pavelic & LeFlore v. Marvel Entertainment Group*, ____ U.S. ____, ____, 110 S.Ct. 456, 460 (1989). The Court emphasized that, "[a]s with a statute, '[w]hen we find the terms ... unambiguous, judicial inquiry is complete.' " *Id.* at

458, *quoting Rubin v. United States*, 449 U.S. 424, 430 (1981). Either the the statute is not as unambiguous as it appears to many courts, or some federal courts have improperly extended judicial inquiry. This division between the lower federal courts should be resolved.

This venue question will not likely or soon reach this Court again. District courts resolve virtually all venue questions, and relatively few venue issues confront the courts of appeals. As with most interlocutory decisions, the venue determination has long been made by the time judgment is entered, and parties usually focus their appeals on the merits of their cases rather than on venue. Accordingly, only one other court of appeals has interpreted section 1392(a) on similar facts, even though the issue continues to divide the district courts. Thus, although arising frequently enough in the district courts to yield numerous conflicting published opinions, and to draw the attention of the leading treatise, the issue has reached the appellate courts only twice and has not been presented to this Court before.

CONCLUSION

The petitioner's federal court judgment against Texas residents was vacated for improper venue even though tried in a district in which one defendant resided. The Fifth Circuit refused to apply section 1392(a) of the Judicial Code because all defendants resided in a common judicial district. There is a conflict in the decisions of the lower federal courts

in applying section 1392(a) when there is a common district in which all the defendants reside.

This Court should grant a writ of certiorari to review the decision of the United States Court of Appeals for the Fifth Circuit because (1) there is a conflict of decisions between the lower federal courts; (2) several lower courts have embellished the plain language of the statute to reach a result beyond that apparently intended by Congress; and (3) the issue of the application of section 1392(a) is squarely presented by this petition. The petition for writ of certiorari should be granted.

Respectfully submitted,

Joseph C. Blanks
REAUD, MORGAN & QUINN
909 Laurel Street
Beaumont, Texas 77704
(409) 838-9941
Attorney of record for Petitioner

Charles Dewey Cole, Jr.
MEYER, SUOZZI, ENGLISH & KLEIN, P.C.
1505 Kellum Place
Mineola, New York 11501
(516) 741-6565
Attorney for Petitioner

APPENDIX

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

GOGOLIN & STELTER,

Plaintiff-Appellee,
Cross-Appellant,

v. No. 88-2360

KARN'S AUTO IMPORTS, INC.,

Defendants,

FIRST CITY BANK, BELLAIRE, N.A.,

Defendant-Appellant,
Cross-Appellee.

October 17, 1989

Appeals from the United States District Court
for the Eastern District of Texas

Before GARWOOD, JONES and SMITH, Circuit Judges

EDITH H. JONES, Circuit Judge:

Procedural issues dominate our review of this commercial litigation, which resulted in a judgment for damages and punitive damages against First City Bank, Bellaire, N.A. (First City). We conclude that First City waived the right to object to the sufficiency of the assignment to Gogolin & Stelter of this cause of action. We

further hold that venue was improperly retained in the Eastern District of Texas and the judgment must be vacated for that reason. Because the case will be remanded for transfer or dismissal, we do not reach most of the other issues raised by the parties.

BACKGROUND

Karn's Auto Imports, Inc. (Karn's) contracted with Stelter G.m.b.H., a German export company, to purchase two Mercedes-Benz automobiles in 1985.[1] A standard method of financing this international transaction was arranged. The automobiles were shipped to the Port of Houston while Stelter G.m.b.H. delivered shipping and collection documents for each of the cars to its German bank. The German bank forwarded these documents to First City, the banker for Karn's. First City was to hold the documents for delivery to Karn's only upon its payment of the purchase price for the automobiles. Things went smoothly until the last step of the transaction. It was alleged, and the jury found, that First City somehow negligently mishandled the documentation so that Karn's walked off with the autos and the certificates of title and never paid for them.

Suit was commenced against First City by Gogolin & Stelter in November 1986.[2] Because the case was filed in

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[1] Stelter G.m.b.H. purchased the autos from Gogolin & Stelter.

[2] Gogolin & Stelter joined First City by filing its second amended complaint. Originally, Gogolin &

the Eastern District of Texas, while First City has its principal place of business in the city of Bellaire, a suburb of Houston in the Southern District of Texas, the bank immediately moved to dismiss for improper venue. This motion was denied.

Certain other pretrial events are significant for our purposes. First City's answer to the second amended complaint denied generally the allegations of Gogolin & Stelter, without, however, challenging its authority as an assignee of the cause of action originally owned by Stelter G.m.b.H. First City did not move to join Stelter G.m.b.H. as the real party in interest. Pretrial discovery did not elucidate the issue of the assignment, nor did the pretrial order, admittedly prepared in haste by both parties on the eve of trial, suggest that Gogolin & Stelter's status as assignee was in question. The only evidence at trial bearing on an assignment came from Thomas Stelter, who explained that Gogolin & Stelter, which was still owed money from its sale of the autos to Stelter G.m.b.H., would receive any

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Stelter had sued Karn's Auto Imports, Abe Karn and Benjamin Franklin Savings Association alleging that the savings and loan had released shipping and title documents for four other automobiles to Karn's before it had paid for them. Before First City was joined in the lawsuit, Benjamin Franklin Savings settled, and a default judgment was taken against Karn's Auto Imports. The Second Amended Complaint named Karn's Auto Imports and Abe and Anna Karn as additional defendants in the same claim for which First City was sued.

recovery from the claim. At the close of plaintiff's case, however, First City moved for a directed verdict, asserting that Gogolin & Stelter had not proved that it was the assignee of the cause of action. Colloquy with the court on this motion was brief, and the motion was perfunctorily denied.

From the adverse judgment of approximately $85,000, First City has appealed.

A. *The Real Party In Interest Defense*

First City initially contends that Gogolin & Stelter never proved that it was an assignee of Stelter's cause of action, hence it was not the real party in interest. The short answer to this contention is that if First City had any serious doubts about this — which is unlikely given that Gogolin & Stelter and Stelter share at least one principal — it should have raised the issue earlier in the trial process. It should not have awaited the time for a directed verdict motion.

Federal Rule of Civl Procedure 17(a) specifies that an action shall be prosecuted in the name of the real party in interest. The purpose of the rule is to prevent multiple or conflicting lawsuits by persons such as assignees, executors, or third-party beneficiaries, who would not be bound by res judicata principles. [6] C. Wright & A. Miller, FEDERAL PRACTICE AND PROCEDURE §1541, at 635 (1971) (hereafter, Wright & Miller). While the rule adopted this policy, it also anticipated that real party in interest disputes should arise rarely and ought to be easily resolved. Such disputes are likely to be evident to a defendant at the

onset of suit, because he almost always knows whether he has been sued by the party who "owns" the claim. Consequently, the rule further provides:

No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for ratification of commencement of the action by, or joinder or substitution of, the real party in interest . . . .

Fed.R.Civ.P. 17(a).

It is thus contemplated that if a defendant objects to being sued by a party who does not have the right to pursue the claim in issue, the real party in interest will be able to step forward and assume the plaintiff's role. Moreover, the allowance of a reasonable time for joinder by the real party in interest necessarily suggests that objection will be raised when such joinder is practical and convenient. The earlier the defense is raised, the more likely that the high cost of trial preparation for both parties can be avoided if a real party in interest question is determined adversely to a plaintiff.

Surely it is inconsistent with the rule to raise a real party in interest defense for the first time on motion for directed verdict. A number of cases have held that the defense was waived when tardily asserted. See, e.g., *Hefley v. Jones*, 687 F.2d 1383, 1388 (10th Cir. 1982) (assertion 16 days before trial is untimely); *McLouth Steel Corp. v. Mesta Mach. Co.*, 116 F.Supp. 689, 691 (E.D.Pa. 1953), *aff'd on other grounds*, 214 F.2d 608 (3rd Cir.), *cert. denied*, 348 U.S. 873, 75 S.Ct. 109, 99 L.Ed. 687 (1954). *See*

also 6 Wright & Miller, *supra* p. 4, §1554 (suggesting that defense be raised in responsive pleadings).

The policy and procedure of the rule were fulfilled when the trial court denied First City's motion for directed verdict, especially if First City "lay behind the log" until that point. We have no difficulty in concluding that it did. First City did not plead that Gogolin & Stelter was not a proper assignee of Stelter G.m.b.H.,[3] nor did it submit interrogatories or request for admissions covering the question. The pretrial order, unfortunately prepared as an afterthought on the eve of trial, did not address real party in interest. First City suggests that the issue was raised during the deposition of Thomas Stelter, but its reference is at best ambiguous. Contrary to the bank's assertion that the testimony regarding an oral assignment laid the groundwork for a contest on the issue, it could as easily have led Gogolin & Stleter to believe that First City, having inquired, was fully satisfied with the assignment.

First City finally argues that appellee itself broached the issue at trial by asking its representative whether Gogolin & Stelter was assigned Stelter's claim and by failing to object

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[3] The defense of real party in interest is distinct from that of lack of capacity, Fed.R.Civ.P. 17(b). Lack of capacity must be raised by specific negative averment, Fed.R.Civ.P.9(a), in order to avoid waiver. While pleading is not required to raise a real party in interest challenge, the specific procedure and policy outlined in Rule 17(a) are equally amendable to finding waiver for an untimely assertion of the issue. See 6 *Wright & Miller, supra* p. 4, § 1554.

to First City's cross-examination on the subject. This argument is untenable; the concept of trial by consent, Fed.R.Civ.P. 15(b), should not be stretched so as to conflict with the procedure and policy prescribed by rule 17(a). In short, First City waived the defense by untimely assertion.[4]

B. *Venue*

Plaintiff's Second Amended Complaint alleged that Plaintiff was a resident of the Federal Republic of Germany and all defendants (Karn's, Abe and Anna Karn, and First City) are residents of Harris County, Texas. These allegations demonstrate the impropriety of venue pursuant to 28 U.S.C. §1391(a), which requires that all plaintiffs or all of the defendants reside in the judicial district where the suit is brought. Neither plaintiff or defendants reside in the Eastern District of Texas, where suit was filed. Because Karn's and First City are corporations, venue might be satisfied under the provisions of 28 U.S.C. §1391(c), as it was when suit was filed,[5] or §1392(a). At various times, Gogolin & Stelter has relied on each of these provisions.

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[4] Given our conclusion, it is unnecessary to address which party has the burden of proving real party in interest and whether Texas or German law should govern the issue.

[5] Effective in February 1989, § 1391(c) has been significantly amended. We shall not speculate how the amendment would affect this litigation, because the Reviser's Note indicates that the new law should apply to cases filed after that date. We find that Note persuasive.

Neither provision supports venue in the Eastern District of Texas.

In the trial court, Gogolin & Stelter relied upon §1391(c), which then provided:

> A corporation may be sued in any judicial district in which it is incorporated or licensed to do business or is doing business, and such judicial district shall be regarded as the residence of such corporation for venue purposes.

Gogolin & Stelter argued that because First City is incorporated or licensed to do business in the State of Texas, our Circuit's law holds it subject to venue in any district in Texas. *Davis v. Hill Engineering, Inc.*, 549 F.2d 314 (5th Cir. 1977). This argument was misplaced, as First City pointed out, because it is a national banking association chartered pursuant to 12 U.S.C. §21 (1982). National banking law authorizes First City to transact business only in the place designated in its certificate, which is outside the Eastern District of Texas. 12 U.S.C. §36 (1982). Hence, First City was neither incorporated nor licensed to do business in the Eastern District of Texas.

Gogolin & Stelter also alleged in conclusory terms that First City must be "doing business" in the Eastern District of Texas. The Bank's response took two forms. First, an affidavit of a bank executive denied that First City "conducts business" in the Eastern District of Texas, and there is no evidence in the record challenging such denial. Additionally, First City demonstrated that federal law prohibits it from

operating a branch in the Eastern District of Texas to the extent that federal law incorporates state law limitations on branch banking. 12 U.S.C. §36(c) (1982); Tex. Const. art. XVI, §16; Tex.Rev.Civ.Stat.Ann. art. 342-903 (Vernon Supp. 1988).[6]

Because its legal and factual arguments stand unrefuted in the record before us, First City must prevail in contending that §1391(c) does not support venue in the Eastern District of Texas. Why the district court decided to the contrary, we do not know, because he filed no memorandum opinion.

In any event, Gogolin & Stelter must have sensed the inadequacy of its position, because on appeal it contends only that venue may be supported by 28 U.S.C. §1392(a), a little-used provision. Section 1392(a) states, in less than pellucid terms, that:

> Any civil action, not of a local nature, against defendants residing in different districts in the same State, may be brought in any of such districts.

Gogolin & Stelter now contends that because co-defendant Karn's was incorporated in Texas, it was a resident of each district in the state. *Davis v. Hill Engineering*, 549 F.2d at 314. Accordingly, although Abe & Anna Karn and First City resided only in Harris County for venue purposes and Karn's likewise had its business

[6] Changes in Texas law made between 1986 and the present date, pertaining to branch banking, were not noted by the parties and do not in any event appear to be relevant to this case.

office there, suit could be brought in the Eastern District of Texas on the principle that the defendants were "residing in different districts in the same state." A few courts have so construed §1392(a). *See, e.g., PI, Inc. v. Valcour Imprinted Papers, Inc.*, 465 F.Supp. 1218 (S.D.N.Y. 1979).

The other construction of §1392(a), urged by First City, is that it was not intended to apply when the defendants all reside in one district for venue purposes, even though one of them may additionally reside in another district within the state. Resort to §1392(a) is simply unnecessary where venue would be authorized by §1391(a). This construction seems more consonant with the language of the provision and its underlying policy. By referring to defendants "residing in different districts in the same state," the statute may be said to exclude a case in which the defendants also reside in the same district. Moreover, this venue provision was intended to simplify a plaintiff's task by allowing suit in one district of a state even though the defendants resided in separate districts. 15 Wright & Miller, *supra* p. 4, §3811, at 132 (1986 ed.). If all of the defendants reside in at least one district, there is no point under this provision in permitting a plaintiff to avail itself of an additional district of venue. Nor should defendant A be required to travel to another district in the state when, although his co-defendant B may reside there, they both reside in A's home district. We follow the courts that have adopted First City's construction of §1392(a). *Andrew H. v. Ambach*, 579

F.Supp. 85 (S.D.N.Y. 1984); *Mazzella v. Stineman*, 472 F. Supp. 432 (E.D.Pa. 1979). Venue was not proper in the Eastern District of Texas.

The remedy for this error is to vacate and remand the case with instructions that the district court transfer to a proper venue or dismiss it, in accordance with 28 U.S.C. §1406(a). We thus held in a Miller Act case that had been tried in the wrong venue. *United States for the Use & Benefit of Harvey Gulf Int'l. Marine, Inc. v. Maryland Casualty Co.*, 573 F.2d 245 (5th Cir. 1978). Judge Rubin dissented in that case. He would have held that, given a lack of demonstrated prejudice to the defendant and the costs and time already sunk in trial, the harmless error rule should compel affirmance. 573 F.2d at 249-51. His dissent acknowledged, however, that prejudice would be inherent in the trial of a tort case before a jury in an improper venue. 573 F.2d 250.

Our court's authority on the remedy for improper venue springs from Justice Frankfurter's opinion in *Olberding v. Illinois Cent. R. Co.*, 346 U.S. 338, 74 S.Ct. 83, 98 L.Ed. 39 (1953). He observed that:

> . . . unless the defendant has . . . consented to be sued in that district, he has a right to invoke the protection which Congress has afforded him. The requirement of venue is specific and unambiguous; it is not one of those vague principles which, in the interest of some overriding policy, is to be given a "liberal" construction.

346 U.S. at 340, 74 S.Ct. at 85. The Supreme Court accordingly reversed a judgment entered for a plaintiff in a court of improper venue to which the defendant had neither consented nor waived his challenge.

C. Miscellaneous Issues

Having resolved that the judgment must be vacated and the case remanded, we need not rule on issues specific to the trial including disputes over the designation of witnesses and introduction of certain affidavit and deposition testimony.

We have, however, reviewed the record and conclude that sufficient evidence existed to justify a jury finding that First City negligently handled the transaction involving the title documents to the two automobiles. *Boeing Co. v. Shipman*, 411 F.2d 365, 374 (5th Cir. 1969) (en banc). We pretermit discussion of the sufficiency of evidence to sustain punitive damages and of the propriety of an award for attorneys' fees, inasmuch as those determinations depend heavily upon the character of the evidence and legal theories which may change in the new trial.

For the foregoing reasons, the judgment of the district court is VACATED and the case is REMANDED for transfer or dismissal as justified by 28 U.S.C. §1406(a).

VACATED and REMANDED.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

GOGOLIN + STELTER,

Plaintiff,

VS. Civil Action No. B-85-1444-CA

KARN'S AUTO IMPORTS, INC.,

Defendants.

AMENDED FINAL JUDGMENT

On the 28th day of January, 1988, the above-styled and numbered cause came on for trial. At the conclusion of the evidence, the Court directed a verdict against Karn's Auto Imports, Inc. and Abe R. Karn. On the 29th day of January, 1988, the jury rendered a verdict in favor of the Plaintiff and against the Defendant First City Bank-Bellaire, N.A. On the 29th day of January, 1988, this Court signed and entered a Final Judgment in favor of the Plaintiff and against the Defendants First City Bank-Bellaire, N.A., Karn's Auto Imports, Inc., and Abe R. Karn. On February 12, 1988, Defendant First City Bank-Bellaire, N.A. filed its Motion for Judgment Notwithstanding the Verdict, or in the Alternative, Motion to Amend the Judgment. The Court, having considered said Motion, is of the opinion that the Judgment signed and entered on the 29th day of January, 1988, should be amended by deleting therefrom the award of $14,000.00 in attorneys' fees against Defendant First City Bank-Bellaire, N.A., and that otherwise, Defendant First City Bank-Bellaire, N.A.'s Motion for Judgment

Nonwithstanding the Verdict should be denied. The Court specifically finds that Plaintiff has no statutory or contractual right to recovery of attorneys' fees against Defendant First City Bank-Bellaire, N.A. It is, therefore,

ORDERED, ADJUDGED and DECREED that Judgment is entered in favor of the Plaintiff Gogolin & Stelter as assignee of Stelter Handelgesselshaft m.b.h. and against the Defendants Karn's Auto Imports, Inc. and Abe R. Karn in the amount of DM 78,106.20 at the spot exchange rate in evidence of $.60 per DM for a total of $46,863.72 plus $15,000.00 in attorneys' fees, plus $13,300.18 pre-judgment interest, plus $100,000.00 exemplary damages, for a total judgment amount of $175,163.90. It is, further

ORDERED, ADJUDGED and DECREED that Judgment is entered in favor of the Plaintiff Gogolin & Stelter as assignee of Stelter Handelgesselshaft m.b.h. and against the Defendant First City Bank-Bellaire, N.A. in the amount of $46,863.72 plus $13,300.18 pre-judgment interest, plus $25,000.00 exemplary damages, for a total judgment of $85,163.90. It is further

ORDERED, ADJUDGED and DECREED that Defendants shall pay taxable costs incurred from the date of the filing of the first Complaint alleging causes of action against Defendant First City Bank-Bellaire, N.A., and that Defendants Karn's Auto Imports, Inc. and Abe R. Karn shall pay all taxable costs incurred prior to said date. It is further

ORDERED, ADJUDGED and DECREED that the Judgment amounts shall bear interest at the rate of 7.14% per annum until paid.

SIGNED AND ENTERED this 28 day of March, 1988.

s/_____
UNITED STATES DISTRICT JUDGE

o

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

GOGOLIN & STELTER,
Plaintiff-Appellee,
Cross-Appellant,

v. No. 88-2360

KARN'S AUTO IMPORTS, INC.,
Defendants,

FIRST CITY BANK, BELLAIRE, N.A.,
Defendant-Appellant,
Cross-Appellee.

October 17, 1989

Appeals from the United States District Court
for the Eastern District of Texas

Before GARWOOD, JONES and SMITH, Circuit Judges

J U D G M E N T

This cause came on to be heard on the record on appeal and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the District Court in this cause is vacated, and the cause is remanded to the District Court for further proceedings in accordance with the opinion of this Court.

IT IS FURTHER ORDERED that each party bear its own costs on appeal.

October 17, 1989

ISSUED AS MANDATE:
November 9, 1989

NO. 89-1237

IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

GOGOLIN + STELTER,
Petitioner

v.

FIRST CITY BANK, BELLAIRE, N.A.,
Respondent

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

GUY S. LIPE
VINSON & ELKINS
3205 First City Tower
1001 Fannin
Houston, Texas 77002-6760
(713) 750-1109

Attorney of record for Respondent

Alpha Law Brief Co., Inc. — 8748 Westpark — Houston, Texas 77063 — 789-2000

QUESTION PRESENTED

In a civil action against multiple defendants all residing in a single district, can 28 U.S.C. § 1392(a) be utilized to sustain venue in another district of the same state where only one of the defendants also resides?

TABLE OF CONTENTS

INDEX OF AUTHORITIES

CASES

STATUTES & TREATISES

NO. 89-1237

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FIRST CITY BANK, BELLAIRE, N.A.,
Respondent

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

To The Honorable Chief Justice And Justices of the Supreme Court of the United States:

Respondent opposes the Petition for Writ of Certiorari.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 886 F.2d 100 (5th Cir. 1989) and is accurately reproduced in the appendix to the Petition for Writ of Certiorari at *a*. The judgment of the United States District Court for the Eastern District of Texas is unreported and is accurately reproduced in the appendix to the Petition for Writ of Certiorari at *m*.

The judgment of the United States Court of Appeals for the Fifth Circuit is accurately reproduced in the appendix to the Petition for Writ of Certiorari at *p.*

JURISDICTION

This Court has jurisdiction to review the judgment of the Fifth Circuit Court Appeals pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

28 U.S.C. § 1392. Defendants or property in different districts in same State.

(a) Any civil action, not of a local nature, against defendants residing in different districts in the same State, may be brought in any of such districts.

REASONS FOR DENYING THE WRIT

The decision of the Fifth Circuit Court of Appeals is correct and does not warrant review by this Court.

1. The Fifth Circuit's construction of 28 U.S.C. § 1392(a) is consistent with both the literal language of the statute and its underlying purpose. By its own terms, the statute applies only to a civil action against "defendants residing in different districts in the same state." 886 F.2d at 104. The Fifth Circuit properly concluded that defendants who reside in a single district in the same state are not "defendants residing in different districts in the same State." Professor Charles Allen Wright, cited by Petitioner on numerous occasions in the Petition for Writ of Certiorari, agrees that "[t]he language of § 1392(a) lends some support to the view that it does not apply" to a case where all defendants are residents of a single

district in the state. C. Wright, FEDERAL COURTS § 42 at 246 (4th ed. 1983). In holding that 28 U.S.C. § 1392(a) does not apply if all defendants reside in a single district, the Fifth Circuit complied with its obligation, as set out in *Pavelic & LeFlore v. Marvel Entertainment Group*, ____U.S.____, 110 S.Ct. 456, 460 (1989), "to apply the text" of the statute.

The Fifth Circuit's construction of § 1392(a) also is consistent with the statute's underlying policy. As stated by Professor Wright, "the evident purpose of § 1392(a) . . . is to permit a single suit in a situation where two suits would otherwise be required." C. Wright, FEDERAL COURTS § 42 at 246 (4th ed. 1983). As the Fifth Circuit concluded, if all of the defendants reside in a single district, there is no point in permitting a plaintiff to avail itself of an additional district of venue. 886 F.2d at 104. The strained construction urged by Petitioner would permit the plaintiff in this case to file its suit in the Amarillo Division of the Northern District of Texas, which is hundreds of miles from Houston, where all of the defendants have their residence and principal place of business and where venue could be sustained under 28 U.S.C. § 1391, the general venue statute. The Fifth Circuit's construction of § 1392(a) is consistent with its language and purpose and avoids the absurd results which would occur if Petitioner's construction was adopted.

2. Contrary to the implication of the Petition for Writ of Certiorari, there is no division among the United States Courts of Appeal on the issue presented in this case. The two U.S. Court of Appeals decisions cited by Petitioner, *Board of County Commissioners v. Wilshire Oil Co.*, 523 F.2d 125 (10th Cir. 1975) and *Vance Trucking*

Co. v. Canal Insurance Co., 338 F.2d 943 (4th Cir. 1964), did not involve a situation where all defendants resided in a single district in a state while less than all of the defendants also resided in the district where the suit was brought. In the *Wilshire Oil* case, there was no suggestion that all of the defendants resided in a single district. In *Vance Trucking*, the two corporate defendants were both South Carolina corporations, one doing business in the Eastern District of South Carolina and the other doing business in the Western District of South Carolina. The court found it unnecessary to decide whether the corporations' status as South Carolina corporations made both of the corporations residents of all districts in South Carolina, holding that if the corporations were only residents of the Eastern District and the Western District respectively, venue would be proper under § 1392(a). The court did not hold that § 1392(a) can apply even if all of the defendants reside in a single district.

In short, there is no division of authority among the Courts of Appeals on the issue presented. The Fifth Circuit's decision in this case represents the only Court of Appeals decision addressing this issue, and as noted above, it correctly resolved the issue.

3. Respondent acknowledges that there is some division of authority among the federal district courts on the applicability of § 1392(a) to the factual situation involved in this case. However, Respondent respectfully submits that the trend of the more recent cases is toward the construction given the statute by the Fifth Circuit in this case.

Although Petitioner cites many district court decisions which Petitioner claims support its position, only five cases cited by Petitioner have held that § 1392(a) applies to a situation where all defendants reside in a single district. One of the cases is out of the Southern District of New York, *PI, Inc. v. Valcour Imprinted Papers, Inc.*, 465 F. Supp. 1218 (S.D.N.Y. 1979), three are out of the district courts of Pennsylvania, *Hawkins v. National Basketball Association*, 288 F. Supp. 614 (W.D. Pa. 1968), *De George v. Mandata Poultry Co.*, 196 F. Supp. 192 (E.D. Pa. 1961), and *Minter v. Fowler & Williams, Inc.*, 194 F. Supp. 660 (E.D. Pa. 1961), and one is out of the Western District of Missouri, *Jackson v. Phelps Regional Medical Center*, 702 F. Supp. 235 (W.D. Mo. 1988).

Subsequent to the decision by the New York court in *PI, Inc.*, other district courts in New York have rejected the rationale of that case and adopted the construction of § 1392(a) utilized by the Fifth Circuit in this case. *See Andrew H. v. Ambach*, 579 F. Supp. 85 (S.D.N.Y. 1984); *Canaday v. Koch*, 598 F. Supp. 1139 (E.D.N.Y. 1984). Similarly, the most recent decision out of Pennsylvania rejected the prior Pennsylvania decisions and adopted the approach utilized by the Fifth Circuit in holding that § 1392(a) does not apply if all of the defendants reside in a single district. *Mazzella v. Stineman*, 472 F. Supp. 432 (E.D. Pa. 1979). The decision of the Western District of Missouri in *Jackson* cites no authority in support of its conclusion and represents an aberration from the current trend of decisions of the federal courts.

CONCLUSION

As noted by the Fifth Circuit in its opinion, 28 U.S.C. § 1392(a) is "a little-used provision." Although the statute in one form or another has been in place since the 1800's, only a handful of cases have addressed its applicability to a situation where all defendants reside in a single district, the fact situation presented in this case. There is no split among the circuits in the resolution of the issue presented in this case, and the trend of federal court decisions is toward the construction given the statute by the Fifth Circuit in this case. The Fifth Circuit's construction is consistent with both the language of the statute and its underlying purpose. For all of these reasons, the decision of the Fifth Circuit does not warrant review by this Court and the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

GUY S. LIPE
VINSON & ELKINS
3205 First City Tower
1001 Fannin
Houston, Texas 77002-6760
(713) 750-1109

Attorney of record for Respondent